Petition

81-216 No.

Office-Supreme Court, U.S.
FILED
JUL 23 1981
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1981

SELF RETENTION PROGRAMMERS, INC. and ROBERT J. MC RELL,

Petitioners,

vs.

INTERNATIONAL ACCIDENT FACILITIES, INC. a foreign Corporation; STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, a foreign Corporation, authorized to do business in the State of New Jersey; THOMAS P. CARRIGAN and EDWARD DIPPLE,

THOMAS J. CAHILL, as Trustee in Bankruptcy of Associated Transport, Inc.

SIDNEY B. GLUCK, as Trustee in Bankruptcy of Eastern Freightways, Inc.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MICHAEL A. QUERQUES
LOUIS C. ESPOSITO
Attorneys for Petitioners
433 Central Avenue
Orange, New Jersey 07050
(201) 673-1400

5300 LUTZ APPELLATE PRINTERS, INC.
NY (212) 840-9494 • (516) 222-1606 • (914) 683-9363
NJ (201) 257-6850 • PA (215) 563-5587 • DC (202) 783-7288 • MA (617) 227-1133

QUESTIONS PRESENTED

In this suit the United States District Court entered default judgments against petitioners who refused to give answers to depositions and interrogatories in a civil suit. The United States Court of Appeals for the Third Circuit affirmed the judgment of the United States District Court.

The questions presented are:

1. Does a defendant in a civil action have the right to invoke the Fifth Amendment privilege against self-incrimination when he is under indictment in a collateral matter?

2. Should a defendant acting in a *pro se* posture be penalized for a blanket assertion of that privilege?

PARTIES

The other parties to the proceeding in the court whose judgment is sought to be reviewed were:

SEABOARD SURETY COMPANY, a New York Corporation

vs.

UNDERWRITERS AT LLOYDS, LONDON; LOWNDES LAMBERT LTD. OF LONDON, ENGLAND, and LOWNDES LAMBERT (USA) INC.

SELF RETENTION PROGRAMMERS, INC., and ROBERT J. MC RELL,

Third Party Defendants &
Fourth Party Plaintiffs,

vs.

INTERNATIONAL ACCIDENT FACILITIES, INC., A FOREIGN CORPORATION; STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, A FOREIGN CORPORATION AUTHORIZED TO DO BUSINESS IN THE STATE OF NEW JERSEY; THOMAS P. CARRIGAN: and EDWARD A. DIPPLE,

Fourth Party Defendants

THOMAS J. CAHILL, AS TRUSTEE IN BANKRUPTCY OF ASSOCIATED TRANSPORT, INC., SIDNEY B. GLUCK, as Trustee in Bankruptcy of Eastern Freightways, Inc.,

Intervenor, Defendant and
Third Party Plaintiff

Self Retention Programmers, Inc. and Robert J. McRell, Third Party Defendants-Fourth Party Plaintiffs,

Appellants.

TABLE OF CONTENTS

Page

Questions Presented i

Parties ii

Table of Contents iii

Table of Citations iii

Opinions Below 2

Jurisdiction 2

Constitutional Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Writ:

I. The District Court's impropriety granted judgment against McRell and Self Retention based upon their refusal to provide discovery since that refusal was a proper invocation of their Fifth Amendment privilege. 7

Conclusion 12

TABLE OF CITATIONS

Cases Cited:

Devita v. Sills, 422 F. 2d 1172 (3 Cir. 1970) 9

Contents

Page

Harrigan & Sons v. Enterprise Animal Oil Co., 14 F.R.D. 333 (U.S.D.C., E.D.P.A. 1953) 10

Lefkowitz v. Turley, 414 U.S. 70, 38 L. Ed. 2d 274, 94 S. Ct. 316 (1973) 7

Mahne v. Mahne, 66 N.J. 53 (1974) 8, 9, 11

Robert v. Taylor, 540 F. 2d 542 (9th Cir. 1976) 8

United States v. American Radiator & Standard San. Corp., 388 F. 2d 201 (3 Cir. 1967) 10

United States v. Kordel, 397 U.S. 1, 25 L. Ed. 2d 1, 90 S. Ct. 763 (1970) 8

United States v. Oliver, 410 F. Supp. 248 (D.C. S.D. Pa. 1976) 8

United States v. Segal, 549 F. 2d 1299 (1st Cir. 1977) 8

Statute Cited:

28 U.S.C. §1254(1) 2

United States Constitution Cited:

Fifth Amendment .....i, 2, 7, 8, 9, 10, 11

APPENDIX

Order of the United States District Court for the District of New Jersey Filed December 4, 1979 ..... 1a

Contents

Page

Order of the United States District Court for the District of New Jersey Filed July 30, 1979 ..... 4a

Stipulation and Order of the United States District Court for the District of New Jersey Filed April 15, 1980 .. 10a

Judgment of the United States District Court for the District of New Jersey Filed September 9, 1980 ..... 15a

Order of the United States District Court for the District of New Jersey Filed October 16, 1979 ..... 19a

Judgment Order of the United States Court of Appeals for the Third Circuit Entered April 24, 1981 ..... 22a

No.

In The

Supreme Court of the United States

October Term, 1981

SELF RETENTION PROGRAMMERS, INC. and ROBERT J. MC RELL,

Petitioners,

vs.

INTERNATIONAL ACCIDENT FACILITIES, INC. a foreign Corporation; STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, a foreign Corporation, authorized to do business in the State of New Jersey; THOMAS P. CARRIGAN and EDWARD DIPPLE,

THOMAS J. CAHILL, as Trustee in Bankruptcy of Associated Transport, Inc.

SIDNEY B. GLUCK, as Trustee in Bankruptcy of Eastern Freightways, Inc.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the United States District Court was found in separate orders and are attached hereto in the appendix, *infra* (1a). The opinion of the United States Court of Appeals for the Third Circuit entered on April 24, 1981 is unreported and appears in the appendix, *infra* (22a).

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was made and entered on April 24, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE

This action arose in the District Court of New Jersey and involved the failure by certain parties to pay excess insurance claims. It is a complicated, multi-party action involving numerous claims and counterclaims.

The initial action was started by Seaboard Surety Company (Seaboard) on September 23, 1977 against Underwriters at Lloyd's, London, Lowndes, Lambert, Ltd. of London, England (Lowndes, England) and Lowndes Lambert (U.S.A.), Inc. (Lowndes, U.S.A.). Plaintiff, Seaboard Surety Company (Seaboard), had issued bonds in favor of Associated and Eastern securing that portion of their liability coverage to be "self-retained" below the excess liability policies purportedly issued through Self Retention and Mr. McRell. Seaboard sought a

declaration that certain excess liability policies purportedly issued in favor of Associated and Eastern by Lloyds were valid and existing.

Lowndes, U.S.A. and Lowndes, England filed a third party action against Self Retention Programmers, Inc. and Robert J. McRell, claiming that such insurance policies were never issued or if issued were so issued without authority and that Self Retention and Robert J. McRell retained the premiums.

Petitioners filed a fourth party action against International Accident Facilities, Inc. (IAF), State Mutual Life Assurance Company of America (State Mutual), Thomas P. Carrigan and Edward A. Dipple claiming basically that those companies and individuals unlawfully and improperly denied certain insurance coverage as a result of a conspiracy among them.

On April 28, 1976 both Associated and Eastern were adjudicated bankrupts by orders of the United States Bankruptcy Court for the Southern District of New York. Thomas J. Cahill (Associated Trustee) and Sidney B. Gluck (Eastern Trustee) were duly appointed trustees in bankruptcy for Associated and Eastern respectively.

Both trustees intervened in the action as defendants and third party plaintiffs for the purpose of asserting claims for damages against Self Retention, McRell, Lowndes, U.S.A. and Lowndes, England.

The petitioner McRell and the fourth party defendant Carrigan were indicted on criminal charges by the Commonwealth of Massachusetts. The indictments were returned before the filing of petitioners amended fourth party complaint. The date of that indictment was June 1978 and from that date forward the petitioner has refused to answer the

discovery requests of any of the complaining parties. The indictments flowed from the placement of the various forms of insurance coverages which constituted the thrust of the litigation pending before the United States District Court for the District of New Jersey. McRell applied to the District Court to stay all discovery proceedings pending the disposition of indictments issued by the Commonwealth of Massachusetts. That application was denied. McRell is the president and sole stockholder of Self Retention Programmers Inc. and as such was the person sought to be deposed or of whom interrogatories and production of documents were requested on behalf of the corporation as well as individually. In refusing to comply with the discovery requests, petitioners have on several occasions asserted their constitutional right against self-incrimination, the validity of which forms the basis of this appeal.

As a result of their refusal to cooperate in discovery requests, four separate motions for sanctions by State Mutual, Cahill, IAF and Dipple respectively were entered by the District Court in an order dated July 30, 1979. The order granted the following relief:

1. Dismissing the amended fourth party complaint of petitioners against State Mutual;

2. Dismissing with prejudice the answer and defenses of petitioners to the State Mutual counterclaim;

3. Granting State Mutual relief demanded against petitioners in the State Mutual counterclaim;

4. Striking the answer and defenses of petitioners to the amended third party complaint of Cahill;

5. Granting judgment against petitioners for the relief demanded in the third party complaint of Cahill;

6. Dismissing the amended fourth party complaint of petitioners against IAF;

7. Dismissing the amended fourth party complaint of petitioners against Dipple.

Petitioners appealed that order to the Third Circuit. The appeal was dismissed on the grounds that the order was interlocutory.

The District Court took the following action (1) entered an order on October 16, 1979 which dismissed petitioners' counterclaim against Lloyds Lowndes, England and Lowndes, U.S.A. and granted judgment against petitioners for the relief demanded against them in the third party complaint filed by Lloyds Lowndes, England and Lowndes, U.S.A.; and (2) entered an order on December 4, 1979 which struck and suppressed the answer and defenses of petitioners to the third party complaint of Gluck and granted judgment against petitioners for the relief demanded in the third party complaint of Gluck. Appeals from those orders were taken to the Third Circuit and withdrawn based on the previous dismissal of the July 30, 1979 order.

Finally, on September 8, 1980, the District Court entered judgment in favor of Associated Transport, Inc. for $1,319,552.28; in favor of State Mutual for $89,683.52; in favor of Lowndes, London and Lowndes, U.S.A. for $602,500; in favor of Eastern Freightways, Inc. for $383,688.44 with interest at 8% and costs against petitioner. From that final order, petitioners appealed to the Third Circuit Court of Appeals. The appeal was decided in favor of the District Court actions on

April 24, 1981. It is from that decision that the petitioners now seek a determination by this Court.

It should be noted, prior to any discussion of why the petition should be granted, that the action originally initiated in the District Court for the District of New Jersey was started after a similar action had been in progress in the Middlesex County Chancery Court. The Middlesex Chancery matter was started by McRell and Self Retention Programmers for a declaratory judgment. It seems petitioners became aware that a large number of insureds and potential claimants were being denied coverage. The parties to that Chancery action were the same as the parties to the subsequent District Court action with the exception of Eastern Freightways and Associated Transport. While the Superior Court matter was pending, volumes of discovery were taken by way of interrogatories which were answered together with five days of depositions of petitioner McRell. In fact some 900 pages of deposition were taken by five lawyers of McRell. Throughout the proceeding no claim of a Fifth Amendment privilege was made.

It is of further significance that the petitioners acted as their own counsel through much of the disputed discovery procedure due to their inability to pay their attorney.

REASONS FOR GRANTING THE WRIT

I.

The District Court's impropriety granted judgment against McRell and Self Retention based upon their refusal to provide discovery since that refusal was a proper invocation of their Fifth Amendment privilege.

The decision of the Third Circuit, as it affects the petitioners McRell and Self Retention Programmers, Inc. raises an important question as to petitioners' invocation of the constitutional right against self-incrimination as provided in the Fifth Amendment to the Constitution.

The Fifth Amendment of the Constitution of the United States provides:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." United States Constitution, Amendment 5.

In *Lefkowitz v. Turley*, 414 U.S. 70, 38 L. Ed. 2d 274, 94 S. Ct. 316 (1973) the Supreme Court made it crystal clear that the Fifth Amendment protection extends to settings other than criminal prosecution. They said in part:

> "The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution, but also privileges him not to answer official questions put to him in any other civil or criminal, formal or informal where the answers might incriminate him in the future criminal proceedings."

The aforesaid determination is now axiomatic and needs no further support. *See Robert v. Taylor,* 540 F. 2d 542 (9th Cir. 1976); *United States v. Segal,* 549 F. 2d 1299 (1st Cir. 1977); *United States v. Oliver,* 410 F. Supp. 248 (D.C. S.D. Pa. 1976).

The courts have also held that a corporation has no Fifth Amendment protection against compulsory self-incrimination, an officer of the corporation may invoke his Fifth Amendment privilege against self-incrimination with regard to discovery directed to the corporation and is not barred from asserting his privilege simply because the corporation has no privilege of its own, or because the proceeding was civil rather than criminal in character. *United States v. Kordel,* 397 U.S. 1, 25 L. Ed. 2d 1, 90 S. Ct. 763 (1970). In the instant case discovery was directed against McRell either personally or as an officer of Self Retention. McRell is the only person connected with the corporation who has knowledge of the information sought by discovery.

In light of the foregoing the petitioners McRell and Self Retention Inc. certainly had the right to invoke the protection of our Fifth Amendment. However, it is without question that that invocation is subject to rules and limitation.

It is conceded at the outset that the trial judge's dismissal of petitioners' fourth party complaint was proper. The Fifth Amendment should not be used as a sword but only as a shield.

Perhaps the best analysis of the sword-shield dichotomy of the Fifth Amendment can be seen in the words of Justice Brennan as quoted in *Mahne v. Mahne,* 66 N.J. 53 (1974):

> "One may not invoke the judicial process seeking affirmative relief and at the same time use the privileges granted by that process to

> avoid development of proof having a bearing upon his rights to such relief. In the instant case, however, the party whose answer is sought to be stricken because he invokes his privilege is a defendant who is in court involuntarily, seeking only to defend, and asserting no affirmative defenses or matters as to which he has any burden of proof." 66 N.J. at p. 59.

In the instant case the petitioners did institute a fourth party complaint in which they alleged fraud and deception on the part of the fourth party defendants. The purpose of this action was to recoup damages in the event of an adverse determination in the cases they were named as defendants. While we have conceded that the district court judge was technically correct in his decision to dismiss this complaint, the Court should realize this complaint was not instituted purely for pecuniary aggrandizement.

As such, it is inappropriate to compare this situation with situations where civil litigation was instituted by the very party seeking to use the privilege to protect itself from discovery while at the same time gaining a judgment against the party seeking discovery.

When considering the remaining portion of the trial judge's order we urge that petitioners were entitled to the Fifth Amendment protection. In fact, petitioners made a good faith effort to call that protection in play.

In their brief to the Third Circuit, respondents argued among other things that a blanket assertion of the Fifth Amendment is improper. The respondents, relying on *Devita v. Sills*, 422 F. 2d 1172 (3 Cir. 1970) pointed out that while the Fifth Amendment is available a criminal defendant must at least

assert the privilege and then work through discovery requests labeling those to which the privilege applies. *See also, United States v. American Radiator and Standard San. Corp.*, 388 F. 2d 201 (3 Cir. 1967).

The petitioner in the instant matter while under criminal indictment did advise the court, by letter, of his intention to avail himself of the Fifth Amendment. Perhaps he did fail to follow the legal ritual of examining each individual request and then deciding whether or not to invoke the privilege.

However, we submit the following:

1. The petitioner was in a *pro se* status through a good deal of the litigation especially after the first motions for sanctions;

2. The litigation was complex and involved numerous parties and highly sophisticated legal representations;

3. The petitioner was unable to intelligently articulate his Fifth Amendment rights in a question-by-question fashion. As a layman his only safety was a blanket assertion;

4. The petitioner at times did answer each question in a series of interrogatories asserting his privilege.

The respondents also have urged that petitioner's actions showed total disregard for the federal rules and the trial judge. The petitioners had been deposed at great length in the Middlesex County Chancery matter. The failure to fully respond in the district court action was due to the indictment in Massachusetts.

The petitioners agree with the statements found in *Harrigan & Sons v. Enterprise Animal Oil Co.*, 14 F.R.D. 333 (U.S.D.C., E.D.P.A. 1953) wherein the court stated in part:

> "While this will, undoubtedly cause inconvenience and delay to the plaintiff, protection of the defendants' constitutional rights is the more important consideration."

Petitioners again would ask this Court to again examine the decision in the New Jersey Supreme Court in *Mahne v. Mahne, supra.* The New Jersey court in dealing with this type of situation had the following to say:

> "Proper balances are the goal and trial courts must seek those sanctions which are best designed to protect the pertinent public and private interests without impairing the historic design of the privilege. The striking of the answers of the defendants, thereby placing them in the position of defaulting and non-resisting parties, appears to us to have imposed an undue cost on the exercise of the privilege and to have been unwarranted in the circumstances." *Mahne, supra* at p. 61-62.

The petitioners would urge this Court in analysis of the instant case to be persuaded in like manner. Petitioner McRell will suffer greatly because he attempted to avail himself of his Fifth Amendment rights. The respondents on the other hand will only suffer a slight delay. The foregoing coupled with the unusual circumstances of this case, *i.e.,* the disparity of the parties, the complexities of the issues and the fact that petitioner acted *pro se* through much of this matter would certainly demonstrate the undue cost imposed on the petitioner. The "proper balance", the goal courts strive for, is certainly not served by the default judgments against petitioners.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

MICHAEL A. QUERQUES
LOUIS C. ESPOSITO
Attorneys for Petitioners

APPENDIX

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED DECEMBER 4, 1979

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 77-1986
(Judge Stern)

SEABOARD SURETY COMPANY, a New York Corporation,

Plaintiff,

-vs-

UNDERWRITERS AT LLOYDS, LONDON, LOWNDES LAMBERT LTD. OF LONDON, ENGLAND AND LOWNDES LAMBERT (USA), INC.,

Defendants,

-vs-

SELF RETENTION PROGRAMMERS, INC. and ROBERT J. McCRELL,

Third Party Defendants
and Fourth Party Plaintiffs,

-vs-

Order

INTERNATIONAL ACCIDENT FACILITIES, INC., a foreign corporation; STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, a foreign corporation authorized to do business in the State of New Jersey; THOMAS P. CARRIGAN: and EDWARD P. DIPPLE,

Fourth Party Defendants,

THOMAS J. CAHILL, as Trustee in Bankruptcy of ASSOCIATED TRANSPORT, INC.,

Intervenor Defendant
and Third Party Plaintiff,

SIDNEY B. GLUCK, as Trustee in Bankruptcy of EASTERN FREIGHT WAYS, INC.,

Intervenor Defendant
and Third Party Plaintiff.

Intervenor Defendant and Third Party Plaintiff, Sidney B. Gluck, as Trustee in Bankruptcy of Eastern Freight Ways, Inc. ("Gluck"), having applied to this Court pursuant to Rule 37 of the Federal Rules of Civil Procedure for an Order striking the answer and defenses of Third Party Defendants and Fourth Party Plaintiffs Robert J. McRell ("McRell") and Self Retention Programmers, Inc. ("Self Retention") and granting judgment to Gluck against McRell and Self Retention for the relief demanded in the Third Party Complaint, and the Court having fixed November 13, 1979 at 10:00 o'clock in the forenoon as the date and time of the hearing upon the motion of Gluck, and the hearing upon the relief sought by Gluck having been held before the Court on November 13, 1979;

Order

NOW, upon the reading and filing of the Notice of Motion by Gluck dated October 10, 1979, and the Affidavit of Joshua J. Angel, Esq., sworn to October 10, 1979 with the exhibits annexed thereto submitted in support of the motion by Gluck; and the Proof of Service dated October 10, 1979; and Gluck, by his Counsel, Marcus & Angel, P.C., Peter D. Wolfson, Esq., of Counsel, having appeared and argued in support of the motion by Gluck; and Underwriters at Lloyds London, Lowndes Lambert Ltd. of London, England, and Lowndes Lambert (U.S.A.), Inc., by their Counsel, Wilentz, Goldman & Spitzer, Alan M. Darnell, Esq., of Counsel, having appeared, and there having been no appearance by McRell or Self Retention and no other person having appeared in support of or in opposition to the aforesaid motion, and said motion having regularly come on to be heard, argued and submitted to this Court on November 13, 1979, and due deliberation having been had thereon, and good cause appearing, it is

ORDERED, that the motion of Gluck be, and hereby is, granted in all respects; and it is further

ORDERED, that the answer and defenses of McRell and Self Retention to the Third Party Complaint be, and hereby are, stricken and suppressed, and that Gluck shall have judgment against McRell and Self Retention for the relief demanded against them by Gluck in his Third Party Complaint.

Dated: December 4, 1979
Newark, New Jersey

s/ Herbert B. Stern
HERBERT B. STERN
United States District Judge

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED JULY 30, 1979

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Docket No. 77-1986
(Judge Stern)

Filed Jul. 30, 1979
Angelo W. Locascio

SEABOARD SURETY COMPANY, a New York Corporation,

Plaintiff,

vs.

UNDERWRITERS AT LLOYDS, LONDON, LOWNDES LAMBERT LTD. OF LONDON, ENGLAND AND LOWNDES LAMBERT (USA), INC.,

Defendants,

vs.

SELF RETENTION PROGRAMMERS, INC. and ROBERT J. McRELL,

Third Party Defendants
and Fourth Party Plaintiffs,

vs.

Order

INTERNATIONAL ACCIDENT FACILITIES, INC., a foreign corporation; STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, a foreign corporation authorized to do business in the State of New Jersey; THOMAS P. CARRIGAN; and EDWARD A. DIPPLE,

Fourth Party Defendants,

THOMAS J. CAHILL, as Trustee in Bankruptcy of Associated Transport, Inc.,

Intervenor Defendant
and Third Party Plaintiff,

SIDNEY B. GLUCK, as Trustee in Bankruptcy of Eastern Freight Ways, Inc.,

Intervenor Defendant
and Third Party Plaintiff.

Defendant and Fifth Party Plaintiff, State Mutual Life Assurance Company of America ("State Mutual"), having applied to this Court pursuant to Rule 37 of the Federal Rules of Court Procedure for an Order dismissing with prejudice those portions of the Amended Fourth Party Complaint of McRell and Self Retention insofar as it requests relief against State Mutual, striking the answers and defenses of Fifth Party Defendants to the counterclaim of State Mutual, and granting judgment against McRell and Self Retention for the relief demanded in the State Mutual counterclaim; and

Defendant and Third Party Plaintiff Thomas J. Cahill, as Trustee in Bankruptcy of Associated Transport, Inc. ("Cahill"), having applied to this Court pursuant to Rule 37 of the Federal

Order

Rules of Civil Procedure for an Order striking the answers and defenses of Third Party Defendants and Fourth Party Plaintiffs Robert J. McRell ("McRell") and Self Retention Programmers, Inc. ("Self Retention") to the Amended Third Party Complaint of Cahill and granting judgment to Cahill against McRell and Self Retention for the relief demanded in the Amended Third Party Complaint; and

Fourth Party Defendants International Accident Facilities, Inc. ("IAF") and Edward A. Dipple ("Dipple") each having separately applied to this Court pursuant to Rule 37 of the Federal Rules of Civil Procedure for Orders dismissing with prejudice the Amended Fourth Party Complaint of McRell and Self Retention insofar as it seeks relief against each of them;

And all parties have been noticed, the Court having fixed June 25, 1979 at 10:00 o'clock in the forenoon as the date and time of the hearing upon the motions of State Mutual, Cahill, IAF and Dipple, and a hearing upon the relief sought by all parties having been held before the Court on June 25, 1979, and State Mutual, by its counsel, McCarter & English, John McGoldrick, Esq., of counsel, having appeared and argued in support of the motion by State Mutual; Cahill, by his counsel, Anderson Russell Kill & Olick, P.C., Andrew P. Brozman, Esq., of counsel, having appeared and argued in support of the motion by Cahill; IAF, by its counsel, Pitney, Hardin & Kipp, Dennis R. LaFiura having appeared and argued in support of the motion of IAF; Dipple, by his counsel, Greenberg & Dauber, having appeared and argued in support of the motion by Dipple; and Underwriters at Lloyds, London, Lowndes Lambert (USA), Inc. and Lowndes Lambert Ltd. of London, England, by their counsel, Wilentz, Goldman & Spitzer, Alan

Order

M. Darnell, Esq. of counsel, having appeared; and there having been no appearance by McRell or Self Retention and no other person having appeared or filed papers in support of or in opposition to any of the aforesaid motions, and the papers filed having been considered, all of the motions having regularly come on to be heard, argued and submitted to this Court, due deliberation having been had thereon, and good cause appearing;

IT IS this 30 day of July, 1979;

ORDERED as follows:

1. That the motion of State Mutual be, and hereby is, granted in all respects, in that the Amended Fourth Party Complaint of McRell and Self Retention against State Mutual be, and hereby is, dismissed with prejudice, the answer and defenses of McRell and Self Retention to the State Mutual counterclaim are stricken and suppressed, and State Mutual shall be granted judgment against McRell and Self Retention for the relief demanded against them in the State Mutual counterclaim; and

2. That the motion of Cahill be, and hereby is, granted in all respects, in that the answer and defenses of McRell and Self Retention to the Amended Third Party Complaint be, and hereby are stricken and suppressed, and that Cahill shall be granted judgment against McRell and Self Retention for the relief demanded against them by Cahill in his Amended Third Party Complaint; and

3. That the motion of IAF be, and hereby is, granted in all respects, in that the Amended Fourth Party Complaint of

Order

McRell and Self Retention against IAF be, and hereby is, dismissed with prejudice.

4. That the motion of Dipple be, and hereby is, granted in all respects, in that the Amended Fourth Party Complaint of McRell and Self Retention against Dipple be, and hereby is, dismissed with prejudice.

s/ Herbert B. Stern
Herbert B. Stern
United States District Judge

We consent to the form and the entry of the within Order.

McCARTER & ENGLISH, Esqs.
Attorneys for Fourth Party Defendant and
Fifth Party Plaintiff State Mutual

By John L. McGoldrick

ANDERSON RUSSELL KILL & OLICK, P.C., Esqs.
Attorneys for Thomas J. Cahill, as Trustee,
etc., Intervenor Defendant and Third Party
Plaintiff

By Steven M. Posner

PITNEY, HARDIN & KIPP
Attorneys for Fourth-Party Defendant
International Accident Facilities, Inc.

By Clyde A. Czud

Order

GREENBERG & DAUBER
Attorneys for Fourth Party Defendant
Edward A. Dipple

By Edward J. Dauber

WILENTZ, GOLDMAN & SPITZER
Attorneys for Defendants Underwriters
at Lloyds, London, Lowndes Lambert
(USA), Inc. and Lowndes Lambert Ltd.
of London, England

By Gordon J. Goldman

STIPULATION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED APRIL 15, 1980

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action
No. 77-1986

Filed Apr. 15, 1980
Angelo W. Locascio

SEABOARD SURETY COMPANY, a New York Corporation,

Plaintiff,

vs.

UNDERWRITERS AT LLOYDS, LONDON, LOWNDES LAMBERT, LTD. OF LONDON, ENGLAND AND LOWNDES LAMBERT (USA), INC.,

Defendants,

vs.

SELF RETENTION PROGRAMMERS, INC., and ROBERT J. McRELL,

Third Party Defendants
and Fourth Party
Plaintiffs,

vs.

Stipulation and Order

INTERNATIONAL ACCIDENT FACILITIES, INC., a foreign corporation; STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, a foreign corporation authorized to do business in the State of New Jersey; THOMAS P. CARRIGAN; and EDWARD A. DIPPLE,

Fourth Party
Defendants,

THOMAS J. CAHILL, as Trustee in Bankruptcy of Associated Transport, Inc.,

Intervenor Defendant
and Third Party
Plaintiff,

SIDNEY B. GLUCK, as Trustee in Bankruptcy of EASTERN FREIGHT WAYS, INC.,

Intervenor Defendant
and Third Party
Plaintiff.

IT IS HEREBY STIPULATED AND AGREED by and between and among the attorneys for Seaboard Surety Company, Underwriters at Lloyds, London, Lowndes Lambert, Ltd. of London, England, Lowndes Lambert (USA), Inc., Thomas J. Cahill, as Trustee in Bankruptcy of Associated Transport, Inc. and Sidney B. Gluck, as Trustee in Bankruptcy of Eastern Freightways, Inc., that the complaint, the counterclaims and cross-claims asserted by each party hereto against each party hereto may be dismissed with prejudice, each party to bear its own costs.

Stipulation and Order

It is the specific intent of the parties to this Stipulation that none of the parties hereto is releasing, settling, resolving, compromising or in any manner whatsoever diminishing any claim that any party hereto had, has or may have against Robert J. McRell, Self Retention Programmers, Inc., Thomas Carrigan or any other person or entity not a party hereto arising out of or relating to the claims asserted herein or any other claim.

Dated: New York, New York
March 31, 1980

CARPENTER, BENNETT
& MORRISSEY

By Laurence Reich
A Member of the Firm
Attorneys for Plaintiff
Seaboard Surety Company
744 Broad Street
Newark, New Jersey 07102

WILENTZ, GOLDMAN &
SPITZER

By Gordon J. Goldman
A Member of the Firm
Attorneys for Defendants
Underwriters at Lloyds, London;
Lowndes Lambert Ltd. of
London, England; and
Lowndes Lambert (USA), Inc.
900 Route 9
Woodbridge, New Jersey 07095

GOLDBERG & CARLIN

By Philip N. Carlin
A Member of the Firm
Attorneys for Intervenor-
Defendant Thomas J. Cahill,
as Trustee in Bankruptcy
of Associated Transport, Inc.
17 Academy Street
Newark, New Jersey 07102

ANDERSON RUSSELL KILL
& OLICK, P.C.

By Steven M. Posner
A Member of the Firm
Attorneys for Intervenor-
Defendant Thomas J. Cahill,
as Trustee in Bankruptcy
of Associated Transport, Inc.
630 Fifth Avenue
New York, New York 10020

KLEINBERG, MORONEY,
MASTERSON & SCHACTER

By Walter J. Greenberg
A Member of the Firm
Attorneys for Intervenor-
Defendant Sidney B. Gluck,
as Trustee in Bankruptcy
of Eastern Freightways, Inc.
225 Milburn Avenue
Milburn, New Jersey 07041

MARCUS & ANGEL

By: D. Golden
A Member of the Firm
Attorneys for Intervenor-
Defendant Sidney B. Gluck,
as Trustee in Bankruptcy
of Eastern Freightways, Inc.
60 East 56th Street
New York, New York 10022

SO ORDERED:

s/ H.B. Stern
U.S.D.J.

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED SEPTEMBER 9, 1980

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 77-1986
(Judge Stern)

SEABOARD SURETY COMPANY, a New York Corporation,

Plaintiff,

vs.

UNDERWRITERS AT LLOYDS, LONDON, LOWNDES LAMBERT LTD. OF LONDON, ENGLAND AND LOWNDES LAMBERT (USA), INC.,

Defendants,

vs.

SELF RETENTION PROGRAMMERS, INC. and ROBERT J. McRELL,

Third Party Defendants
and Fourth Party Plaintiffs,

vs.

Judgment

INTERNATIONAL ACCIDENT FACILITIES, INC., a foreign corporation; STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, a foreign corporation authorized to do business in the State of New Jersey; THOMAS P. CARRIGAN; and EDWARD A. DIPPLE,

Fourth Party Defendants,

THOMAS J. CAHILL, as Trustee in Bankruptcy of Associated Transport, Inc.,

Intervenor Defendant
and Third Party Plaintiff,

SIDNEY B. GLUCK, as Trustee in Bankruptcy of Eastern Freight Ways, Inc.,

Intervenor Defendant
and Third Party Plaintiff.

This Court having granted judgment against Third Party Defendants Self Retention Programmers, Inc. ("SRP") and Robert J. McRell ("McRell") and in favor of Intervenor-Third Party Plaintiff Thomas J. Cahill, as Trustee in Bankruptcy of Associated Transport, Inc. ("Associated Trustee") and Fourth Party Defendant State Mutual Life Assurance Company of America ("State Mutual") by Order dated July 30, 1979; and Third Party Plaintiffs Lowndes Lambert (USA), Inc. ("Lowndes USA") and Lowndes Lambert Ltd. of London, England ("Lowndes England") by Order dated October 15, 1979; and Intervenor-Third Party Plaintiff Sidney B. Gluck, as Trustee in Bankruptcy of Eastern Freight Ways, Inc. ("Eastern Trustee") by Order dated December 4, 1979; it is hereby

Judgment

ADJUDGED AND DECREED, that the Associated Trustee recover of SRP and McRell, jointly and severally, the sum of $1,319,552.28, with interest thereon at the rate of eight per cent as provided by law; and it is further

ADJUDGED AND DECREED, that State Mutual recover of SRP and McRell, jointly and severally, the sum of $89,083.52, with interest thereon at the rate of eight per cent as provided by law; and it is further

ADJUDGED AND DECREED, that Lowndes USA and Lowndes England recover of SRP and McRell, jointly and severally, the sum of $602,500.00, with interest thereon at the rate of eight per cent as provided by law; and it is further

ADJUDGED AND DECREED, that the Eastern Trustee recover of SRP and McRell, jointly and severally, the sum of $383,668.44, with interest thereon at the rate of eight per cent as provided by law.

Dated at Newark, New Jersey
this 8 day of September, 1980.

s/ H.B. STERN
U.S.D.J.

Judgment

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Office of the Clerk
Newark, N.J.

Civil No. 77-1986

SEABOARD SURETY COMPANY

VS.

UNDERWRITERS AT LLOYDS, LONDON, ET AL.

There was entered on the docket on 9-9-80 Judgment.

ANGELO W. LOCASCIO
Clerk

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED OCTOBER 16, 1979

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 77-1986

Filed Oct. 16, 1979
Angelo W. Locascio

SEABOARD SURETY COMPANY, a NEW YORK CORPORATION,

Plaintiff,

vs.

UNDERWRITERS AT LLOYDS, LONDON, LOWNDES LAMBERT LTD. OF LONDON, ENGLAND and LOWNDES LAMBERT (U.S.A.), INC.,

Defendants.

and

SELF RETENTION PROGRAMMERS, INC., and ROBERT J. McRELL,

Third Party Defendants
and Fourth Party Plaintiffs,

vs.

Order

INTERNATIONAL ACCIDENT FACILITIES, INC., a foreign corporation; STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, a foreign corporation authorized to do business in the State of New Jersey; THOMAS P. CARRIGAN; and EDWARD A. DIPPLE,

Fourth Party Defendants,

THOMAS J. CAHILL, as Trustee in Bankruptcy of Associated Transport, Inc.,

Intervenor Defendant
and Third Party Plaintiff,

SIDNEY B. GLUCK, as Trustee in Bankruptcy of Eastern Freight Ways, Inc.,

Intervenor Defendant
and Third Party Plaintiff.

Defendant, Underwriters At Lloyds, London ("Lloyds"), and defendants-third party plaintiffs, Lowndes Lambert Ltd. of London, England ("Lowndes-England") and Lowndes Lambert (U.S.A.), Inc. ("Lowndes-USA"), having applied to this Court pursuant to Rule 37 of the Federal Rules of Civil Procedure for an Order dismissing with prejudice those portions of the Counterclaim of Self Retention Programmers, Inc. ("Self Retention") and Robert J. McRell ("McRell") insofar as it requests relief against Lloyds, Lowndes-England and Lowndes-USA, striking the answers and defenses of Self Retention and McRell to the Third Party Complaint of Lowndes-England and Lowndes-USA, and granting judgment against Self Retention and McRell for the relief demanded in the Third Party Complaint;

Order

And all parties having been noticed, the Court having fixed October 9, 1979 at ten o'clock in the forenoon as the date and time of the hearing of the aforesaid motion, and a hearing upon the relief set forth above having been held before the Court on October 9, 1979, and Lloyds, Lowndes-England and Lowndes USA, by its counsel, Wilentz, Goldman & Spitzer, Esquires, having appeared and argued in support of the aforesaid motion, and Robert J. McRell having appeared pro se, to argue in opposition to the aforesaid motion, and the papers filed having been considered, and the aforesaid motion having regularly come on to be heard, argued and submitted to this Court, due deliberation having been had thereon, and good cause appearing,

IT IS on this 15 day of October, 1979;

ORDERED as follows:

1. That the motion of Lloyds, Lowndes-England and Lowndes-USA be, and hereby is, granted in all respects, and that the Counterclaim of McRell and Self Retention against Lloyds, Lowndes-England and Lowndes-USA be, and hereby is, dismissed with prejudice, the answer and defenses of McRell and Self Retention to the Third Party Complaint asserted by Lowndes-England and Lowndes-USA are stricken and suppressed and Lowndes-England and Lowndes-USA shall be granted judgment against McRell and Self Retention for the relief demanded against them in the Third Party Complaint filed by Lowndes-England and Lowndes-USA.

s/ H. Stern
HERBERT B. STERN
United States District Judge

JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ENTERED APRIL 24, 1981

No. 80-2559

SEABOARD SURETY COMPANY, a New York Corporation

v.

UNDERWRITERS AT LLOYDS, LONDON; LOWNDES LAMBERT LTD. of London, England, and LOWNDES LAMBERT (USA) INC.

v.

SELF RETENTION PROGRAMMERS, INC., and ROBERT J. MC RELL,

Third Party Defendants and
Fourth Party Plaintiffs,

v.

INTERNATIONAL ACCIDENT FACILITIES, INC., A FOREIGN CORPORATION; STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, A FOREIGN CORPORATION AUTHORIZED TO DO BUSINESS IN THE STATE OF NEW JERSEY; THOMAS P. CARRIGAN; and EDWARD A. DIPPLE,

Fourth Party Defendants

Judgment Order

THOMAS J. CAHILL, AS TRUSTEE IN BANKRUPTCY OF ASSOCIATED TRANSPORT, INC., SIDNEY B. GLUCK, as Trustee in Bankruptcy of Eastern Freightways, Inc.,

Intervenor, Defendant and
Third Party Plaintiff

Self Retention Programmers, Inc. and Robert J. McRell, Third Party Defendants-Fourth Party Plaintiffs,

Appellants

(Civil No. 77-01986 - D.N.J. - Newark)

Submitted Under Third Circuit Rule 12(6)
April 22, 1981

BEFORE: SEITZ, *Chief Judge*, ALDISERT and GIBBONS, *Circuit Judges*

After consideration of the contention raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

By the Court:

s/ Seitz
Chief Judge

Judgment Order

ATTEST:

s/ M. Elizabeth Ferguson
Chief Deputy Clerk

Dated: April 24, 1981

Certified as a true copy and issued in
lieu of a formal mandate on May 18, 1981.

Test: SALLY MRVOS

Clerk, United States Court of Appeals
for the Third Circuit

Opposition

Office-Supreme Court, U.S.
FILED
AUG 29 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-216

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

SELF RETENTION PROGRAMMERS, INC. and ROBERT J. McRELL,
Petitioners,

v.

INTERNATIONAL ACCIDENT FACILITIES, INC., a Foreign Corporation; STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, a Foreign Corporation Authorized to Do Business in the State of New Jersey; THOMAS P. CARRIGAN and EDWARD DIPPLE; THOMAS J. CAHILL, as Trustee in Bankruptcy of ASSOCIATED TRANSPORT, INC.; SIDNEY B. GLUCK, as Trustee in Bankruptcy of EASTERN FREIGHTWAYS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION

ALAN M. DARNELL
Counsel of Record

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
Attorneys for Respondents
900 Route 9, P.O. Box 10
Woodbridge, New Jersey 07095
(201) 636-8000

(Additional Counsel Appear on the Reverse Side of this Cover)

Adams Press Corp., 3 Commerce Street, Newark, N. J. 07102—(201) 623-8611

ANDERSON, RUSSELL, KILL & OLICK, P.C.
666 Third Avenue
New York, New York 10117
(212) 850-0700
Attorneys for Respondent, Thomas J. Cahill

Of Counsel:
ANDREW P. BROZMAN

McCARTER & ENGLISH
550 Broad Street
Newark, New Jersey 07102
(201) 622-4444
Attorneys for Respondent, State Mutual Life Assurance Company of America

Of Counsel:
ROSLYN S. HARRISON

PITNEY, HARDIN, KIPP & SZUCH
163 Madison Avenue
Morristown, New Jersey 07960
(201) 267-3333
Attorneys for Respondent, International Accident Facilities, Inc.

Of Counsel:
DENNIS P. LaFIURA

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
900 Route 9, P.O. Box 10
Woodbridge, New Jersey 07095
(201) 636-8000
Attorneys for Respondents, Underwriters at Lloyd's London, Lowndes Lambert Ltd. of London, England, and Lowndes Lambert (U.S.A.), Inc.

Of Counsel:
ALAN M. DARNELL

GREENBERG, DAUBER & EPSTEIN
Suite 815, Gateway I
Newark, New Jersey 07102
(201) 643-3700
Attorneys for Respondent, Edward A. Dipple

Of Counsel:
EDWARD J. DAUBER

LEON C. MARCUS
475 Park Avenue South
New York, New York 10016
(212) 532-3535
Attorney for Respondent, Sidney B. Gluck

Of Counsel:
PETER D. WOLFSON

Counter-Statement of Questions Presented

1. Where Petitioners wilfully refused to provide any discovery to the respondents in reliance upon a blanket assertion of putative Fifth Amendment privileges in advance of any discovery enquiries propounded, failed to assert any Fifth Amendment privileges in some instances and defaulted in discovery, violated several orders of the District Court compelling Petitioners to provide discovery, and defaulted in every significant proceeding before the District Court, did the Court of Appeals err in upholding sanctions against Petitioners after the District Court afforded them ample opportunity to cure their defaults and avoid the sanctions of dismissal and judgment?

2. May petitioners raise for the first time for review by this Court the issue of their Pro Se representation, when that issue had not been raised in either of the lower courts and they were represented by counsel when all demands for discovery were served and refusals to provide discovery occurred.

Parties

The parties to this proceeding, in their original postures, are as follows:

SEABOARD SURETY COMPANY, a New York Corporation,

Plaintiff,

v.

UNDERWRITERS AT LLOYD'S LONDON, LOWNDES LAMBERT, LTD. OF LONDON, ENGLAND and LOWNDES LAMBERT (U.S.A.), INC.,

Defendants,

v.

SELF RETENTION PROGRAMMERS, INC. and ROBERT J. McRELL,

Third Party Defendants and Fourth Party Plaintiffs,

v.

INTERNATIONAL ACCIDENT FACILITIES, INC., a Foreign Corporation; STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, a Foreign Corporation Authorized to Do Business in the State of New Jersey; THOMAS P. CARRIGAN and EDWARD DIPPLE,

Fourth Party Defendants.

THOMAS J. CAHILL, as Trustee in Bankruptcy of ASSOCIATED TRANSPORT, INC.,

Intervenor.

SIDNEY B. GLUCK, as Trustee in Bankruptcy of EASTERN FREIGHTWAYS, INC.,

Intervenor.

TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF QUESTIONS PRESENTED	i
PARTIES	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
ARGUMENT IN OPPOSITION TO THE PETITION:	
I. Judgment granted against McRell and Self Retention based upon their wilful disregard of court orders and procedural requirements was an appropriate exercise of the trial court's discretion and raises no significant question to be reviewed in this Court	13
II. Alleged prejudice due to Pro Se representation is not an issue	21
CONCLUSION	23

Cases Cited

Affanato v. Merrill Bros., 547 F.2d 138 (1st Cir. 1977)	20
Awtry v. United States, 27 F.R.D. 399 (S.D.N.Y. 1961)	3
Bramble v. Kleindienst, 357 F.Supp. 1028 (D. Colo. 1973) aff'd, 498 F.2d 968 (10th Cir.), cert. denied 419 U.S. 1069 (1974)	3
Brewer v. Hill, 453 F.Supp. 67 (D.C.Tex. 1978)	17
Brown v. Ames, 346 F.Supp. 1176 (D.Minn. 1972)	3

PAGE

Brown v. United States, 411 U.S. 223 (1973) 22

California v. Taylor, 353 U.S. 553 (1957) 22

Christenson v. Christenson, 281 Minn. 507, 162 N.W. 2d 194 (1968) 3

Clark v. Lutcher, 77 F.R.D. 415 (M.D.Pa. 1977) 17

Danning v. Lavine, 572 F.2d 1386 (9th Cir. 1978) 20

DeVita v. Sills, 422 F.2d 1172 (3d Cir. 1970) 15, 17

Drivers v. Helms, 402 F.Supp. 683 (D.R.I. 1975) 16

Golden Quality Ice Cream Co., Inc. v. Deerfield Specialty, 87 F.R.D. 53 (E.D.Pa. 1980) 15

Independent Productions Corp. v. Loew's, Inc., 27 F.R.D. 426 (S.D.N.Y. 1961) 3

Kisting v. Westchester Fire Insurance Co., 290 F. Supp. 141 (W.D.Wis. 1968), aff'd 416 F.2d 967 (7th Cir. 1969) 3

Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73 (D.C.Mass. 1976) 20

Laverne v. Laurel Hollow, 18 N.Y. 2d 635, 272 N.Y.S. 2d 780, 219 N.E. 2d 294 (1966), appeal dismissed, 386 U.S. 682 (1967) 3

Lawn v. United States, 355 U.S. 339 (1958) 22

Lyons v. Johnson, 415 F.2d 540 (9th Cir. 1969), cert. denied, 397 U.S. 1027 (1970) 3

Mahne v. Mahne, 66 N.J. 53 (1974) 19-21

Metropolitan Greetings, Inc. v. Michael McDonough, Inc., 60 F.R.D. 58 (E.D.Pa. 1973) 20

Minor v. Minor, 240 So. 2d 301 (Fla. 1970) 3

PAGE

Paul Harrigan & Sons v. Enterprise Animal Oil Co., 14 F.R.D. 333 (E.D.Pa. 1953) 18, 19

Penn Communications Specialties, Inc. v. Hess, 65 F.R.D. 510 (E.D.Pa. 1975) 3

In re Penn Central Securities Litigation, Robinson v. Penn Central Co., 347 F.Supp. 1347 (E.D.Pa. 1972) 16

R. DeBouard et Cie v. S.S. Ionic Coast, 46 F.R.D. 1 (S.D.Tex. 1969) 20

Rubenstein v. Kleven, 150 F.Supp. 47 (D.Mass. 1957) 3

Stockham v. Stockham, 168 So. 2d 320 (Fla. 1964) 3

United States v. American Radiator & Standard San Corp., 388 F.2d 201 (3d Cir. 1967), cert. denied, 390 U.S. 931 (1968) 14, 15

United States v. Carroll, 567 F.2d 955 (10th Cir. 1977) 14

United States v. Harmon, 339 F.2d 354 (6th Cir. 1954), cert. denied, 380 U.S. (1965) 14

United States v. Kordel, 397 U.S. 1, 90 S.Ct. 763, 25 L.Ed. 2d 1 (1970) 16

United States v. Malnik, 489 F.2d 682 (5th Cir.), cert. denied, 419 U.S. 826 (1974) 14, 16

United States v. Pierce, 561 F.2d 735 (9th Cir. 1977), cert. denied, 435 U.S. 923 (1978) 14

Whippany Paper Board Co., Inc. v. Alfano, 176 N.J. Super. 363 (App.Div. 1980) 21

PAGE

Other Authorities Cited

8 Wigmore, Evidence (McNaughton rev. 1961) 17

Wright & Miller, Federal Practice and Procedure 20

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SELF RETENTION PROGRAMMERS, INC. and ROBERT J. McRELL,

Petitioners,

vs.

INTERNATIONAL ACCIDENT FACILITIES, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION

Preliminary Statement

This joint brief is respectfully submitted on behalf of all the respondents to this Petition for Certiorari to the

United States Court of Appeals for the Third Circuit on its affirmance of the final decision of the United States District Court for the District of New Jersey (Stern, J.). That decision dismissed Petitioners' claims against certain respondents and entered judgment against Petitioners and in favor of certain other respondents. The District Court's decision was predicated upon the wilful disobedience of various court orders by Petitioners arising from their long series of defaults in discovery proceedings. It was an appropriate use of the Court's discovery sanctions.

Statement of the Case

Having wilfully refused to provide any discovery, relying upon a blanket assertion of Fifth Amendment privilege or simply failing to provide any response to discovery demands, and wilfully disobeyed several orders, Petitioners now ask this Court for relief from the consequences of their intransigent and contumacious conduct. In so doing, Petitioners would have the Court believe that the central issue in this appeal is denial of their Fifth Amendment privileges. This is not the case. The only issue is whether recalcitrant litigants who fail to properly invoke Fifth Amendment privileges and violate the Federal Rules and disobey orders of the court may avoid sanctions properly imposed.

In addition, having failed to raise the issue prior to filing this Petition for Certiorari and having been represented by counsel when all discovery demands were served and all responses were provided or defaults occurred, Petitioners seek relief from sanctions based on purported

prejudice due to alleged Pro Se representation. This is not and cannot be an issue before this Court.*

Since the authority for the District Court's discretion in this matter is clear, there is no division of opinion among the Circuits, there is no important federal issue raised, and no injustice has been committed, there is absolutely

---

* Though raised in their appeal before the Third Circuit, Petitioners have not raised in this Petition for Certiorari the issue of the dismissal of their affirmative claims by the District Court, conceding that this was an appropriate exercise of discretion under F.R.C.P. 37. This was necessitated by the fact that the federal courts have uniformly responded to a plaintiff's continued insistence upon avoiding discovery through the invocation of the Fifth Amendment privilege by dismissal of the plaintiff's complaint. *Lyons* v. *Johnson*, 415 F.2d 540, 542 (9th Cir. 1969), *cert. denied*, 397 U.S. 1027 (1970); *Penn Communications Speciaties, Inc.* v. *Hess*, 65 F.R.D. 510, 512 (E.D. Pa. 1975); *Bramble* v. *Kleindienst*, 357 F.Supp. 1028, 1035-36 (D. Colo. 1973), *aff'd*, 498 F.2d 968 (10th Cir.), *cert. denied*, 419 U.S. 1069 (1974); *Kisting* v. *Westchester Fire Insurance Co.*, 290 F.Supp. 141, 149 (W.D. Wis. 1968), *aff'd*, 416 F.2d 967 (7th Cir. 1969); *see Brown* v. *Ames*, 346 F.Supp. 1176, 1177 (D. Minn. 1972); *Awtry* v. *United States*, 27 F.R.D. 399, 403 (S.D.N.Y. 1961); *Independent Productions Corp.* v. *Loew's Inc.*, 27 F.R.D. 426 (S.D.N.Y. 1961). The same result has been reached by state courts that have considered the issue. *See e.g., Minor* v. *Minor*, 240 So.2d 301 (Fla. 1970); *Stockham* v. *Stockham*, 168 So.2d 320 (Fla. 1964); *Christenson* v. *Christenson*, 281 Minn. 507, 162 N.W. 2d 194 (1968); *Laverne* v. *Laurel Hollow*, 18 N.Y.2d 635, 272 N.Y.S.2d 780, 219 N.E.2d (1966), *appeal dismissed*, 386 U.S. 682 (1967).

The rationale for these cases is apparent. A party "cannot work both sides of the street," putting facts into issue and then claiming the privilege against self-incrimination to avoid discovery and cross-examination. *Rubenstein* v. *Kleven*, 150 F.Supp. 47, 48 (D. Mass. 1957). A party may not use the shield of self-incrimination as a sword against his adversaries. *Lyons* v. *Johnson, supra*, 415 F.2d 540.

no reason for additional review. Judge Stern, in the District Court clearly acted within the discretion afforded by F.R.C.P. 37 for discovery sanctions. The Third Circuit examined the record and affirmed his decision, providing no grounds to justify still another review in this Court.

In shifting the focus of this appeal away from their conduct and toward a facile constitutional claim, Petitioners necessarily gloss over the facts that: Petitioners' putative Fifth Amendment privileges were never proffered to the District Court in any manner which could permit Judge Stern to rule upon them; with respect to a significant portion of the discovery proceedings, Petitioners simply wilfully defaulted, asserting no constitutional privilege whatsoever; two separate rounds of Rule 37 motions, comprising at least six separate motions, were necessitated by Petitioners' failure to provide discovery, with Petitioners defaulting on each motion. Clearly, the final orders* and judgment entered against Petitioners were a proper exercise of the District Court's discretion and resulted not from any Fifth Amendment conundrum but rather from Petitioners' calculated design to frustrate this litigation. The Court of Appeals for the Third Circuit correctly affirmed the decision of the District Court.

---

*A money judgment was entered against Petitioners on September 8, 1980. This judgment adjudged them liable in substantial damages to certain of the respondents. The judgment was predicated upon final orders of the District Court entered on July 30, 1979, October 15, 1979 and December 4, 1979, which granted money judgments to certain respondents and dismissed Petitioners' claims as to other respondents.

The District Court litigation.

The action in the District Court arise from a massive insurance fraud perpetrated by Petitioners, Self Retention Programmers Inc. ("Self Retention"), Robert J. McRell ("McRell"), and other parties against, *inter alia*, Associated Transport, Inc. ("Associated") and Eastern Freight Ways, Inc. ("Eastern"). Associated and Eastern were two large trucking companies operating in the eastern and central states. On April 28, 1976, both Associated and Eastern were adjudicated bankrupts by orders of the United States Bankruptcy court for the Southern District of New York. Respondents Thomas J. Cahill ("Associated Trustee") and Sidney B. Gluck ("Eastern Trustee") were duly appointed trustees in bankruptcy for Associated and Eastern, respectively.

The conspirators, together with Thomas Carrigan, President of Lowndes (USA), perpetrated a complex international insurance fraud. As with most conspiracies and particularly with this one (for a time, McRell was actually "in house" at Associated-Eastern), the particulars of the fraudulent acts were peculiarly within the knowledge of the conspirators. Without discovery, neither the claims against Petitioners nor their counterclaims could be properly prosecuted.

Approximately one year after the discovery of the conspiracy, disputes concerning the existence and validity of various Associated-Eastern insurance coverages blossomed into the litigation before the District Court. Plaintiff, Seaboard Surety Company ("Seaboard"), had issued bonds in favor of Associated and Eastern securing that portion of their liability coverage to be "self retained" below the excess liability policies purportedly issued through Self Retention and McRell. On September 23, 1977, Seaboard commenced suit against respondents Underwriters at Lloyds, London ("Lloyds"), Lowndes (USA)

and what was believed to be Lowndes (USA)'s English parent company, defendant-respondent Lowndes Lambert Ltd. of London, England ("Lowndes England"). The essence of Seaboard's complaint was for a declaration that certain excess liability policies purportedly issued in favor of Associated and Eastern by Lloyds existed and were valid.

Lowndes (USA) and Lowndes England thereafter commenced third party actions against Self Retention, McRell and Carrigan, claiming that these purported insurance policies were never issued, and seeking damages from Petitioners for their participation in the conspiracy to defraud Associated and Eastern. The Lowndes respondents predicated their claims on the wrongful issuance of certificates of insurance by Self Retention, McRell and Carrigan, their wrongful retention of premium monies in respect of these phony insurance coverages, and their conversion of monies belonging to Lowndes (USA). In due course, Petitioners served and filed answers and defenses to this third party complaint.*

The Associated Trustee and, later, the Eastern Trustee, intervened in the action as defendants and third party plaintiffs for the purpose of asserting claims for damages against Self Retention, McRell, Lowndes (USA) and Lowndes England arising from the fraud alleged to have been perpetrated by them with respect to a variety of insurance coverages (including the above-mentioned excess liability policies) for which Associated and Eastern paid premiums but which were never obtained.** Mc-

---

* The Lowndes respondents also asserted counterclaims against Seaboard seeking a declaration that the purported excess liability policies were not valid and existing.

** Both trustees similarly asserted counterclaims against Seaboard seeking a declaration that the purported excess liability policies were not valid and existing.

Rell and Self Retention served and filed answers to the Associated Trustee's third party complaint, essentially in the form of a general denial.

Affirmatively joining the fray as plaintiffs, McRell and Self Retention instituted fourth party actions against Carrigan, respondent State Mutual Life Assurance Company of America ("State Mutual"), an insurer through which Petitioners purportedly issued insurance coverage to employees of Associated and Eastern; against respondent, International Accident Facilities, Inc. ("IAF"), a company through which the conspirators purportedly availed themselves of Lloyd's insurance binding facilities; and against respondent, Edward Dipple ("Dipple"), an individual affiliated with both Lowndes (USA) and IAF who similarly possessed certain Lloyd's facilities. In their fourth party complaints (including the amended versions), Petitioners claimed that the fourth party defendant-respondents conspired to improperly and unlawfully deny insurance coverages for Associated and Eastern which Petitioners asserted were validly issued.

Despite their protestations to the contrary (Petition at 9) Petitioners were not drawn into the prosecution of their fourth party claims as mere involuntary claimants reactively seeking indemnification. Even a cursory reading of their fourth party pleadings discloses that Self Retention and McRell claim victimization by means of a fraud perpetrated by the fourth party defendants and, in addition to seeking indemnification, set forth substantial independent claims for both compensatory and punitive damages. In no sense (other than through their intransigence and resulting defaults) were Petitioners passive bystanders to this litigation.

The criminal action.

Before the filing of Petitioners' amended fourth party complaint and before the service of discovery requests by Petitioners to various respondents, Carrigan and McRell were indicted on criminal charges by the Commonwealth of Massachusetts. Petitioners, never having troubled themselves with a motion for a protective order in response to specific discovery requests*, did not place before the District Court or the parties the particular subject matter of the Massachusetts indictments. Petitioners never explained the subject matter of the indictments in a manner sufficient for the District Court to rule on the effect thereof on specific discovery requests. The record thus contains no specific information which could provide this Court with the basis for any Fifth Amendment claim.

Upon information and belief, Carrigan has pleaded guilty to all counts of the indictments handed up against him while McRell is awaiting trial in the criminal case filed against him.

The discovery proceedings in the District Court.

The key to unlocking the mysteries of Associated-Eastern's phantom insurance program was clasped firmly in

---

* Just after the first discovery requests were served upon Petitioners, a motion for a blanket stay of *all* discovery in the civil litigation was made by Petitioners' counsel. Though predicated upon the pendency of the Massachusetts indictments, the only disclosure respecting the indictments was that they "flow[ed] from the placement of these various forms of insurance coverages." (Brief in support of motion for stay at 1, docket entry of July 18, 1978). No particular discovery enquiry was addressed in the motion papers and, in accordance with controlling case law, the blanket stay was denied by the District Court.

the hand of McRell. But because of the manner in which McRell and Self Retention operated as agents for Associated and Eastern, most of the companies' insurance records and documentation were prepared or maintained by the individual Petitioner himself. Except for the knowledge that enormous amounts of money were paid in respect of insurance coverages, the Associated and Eastern Trustees found themselves in the unusual circumstance of not being able to rely fully upon the records of their companies to determine the nature or extent of the purported insurance coverages. After efforts by the Associated Trustee to obtain information essential to proper prosecution and defense were unavailing, discovery directed to Petitioners was sought.

The first attempt at discovery was instituted by the service of notices of deposition by the Associated Trustee and IAF upon McRell and Self Retention on June 30, 1978 and July 5, 1978, respectively. As previously noted, Petitioners' counsel moved the District Court for an order staying all discovery as to them pending disposition of the criminal action against McRell in Massachusetts. The ground asserted in support of the stay was a blanket claim of Fifth Amendment privilege, which purported to immunize McRell from any civil discovery in advance of any actual or specific questioning. The District Court denied the motion, effectively putting Petitioners on notice that if they wanted to raise a Fifth Amendment claim they would have to assert it properly in response to specific enquires.

On November 27, 1978 and August 22, 1978, respectively, the Associated Trustee and IAF propounded in-

terrogatories to Petitioners.* Self Retention's counsel made no reponse to these interrogatories by way of objection or answer. Significantly, *no Fifth Amendment privilege was raised as a ground* for Self Retention's failure to respond. In fact, Self Retention's counsel merely advised counsel for the Associated Trustee that he found the discovery requests to be "overburdensome". IAF's interrogatories received a response, albeit improper, from Petitioners in the form of a privilege assertion pressed in a non-selective, blanket manner to all enquiries. Plainly, Petitioners' assertion of a blanket Fifth Amendment privilege violated the spirit and intent of the District Court's prior order denying a stay of discovery based upon a similar blanket assertion.

Petitioners' failure to provide discovery or to assert claimed privileges in a manner cognizable under law necessitated the first round of motions to compel discovery and for sanctions by respondents. Accordingly, both the Associated Trustee and IAF made motions pursuant to Rule 37 returnable February 13, 1979. Though represented by counsel, Petitioners filed no papers in opposition to these motions.

Notwithstanding Petitioners' default in response to the Rule 37 motions, the District Court did not enter an order granting immediate sanctions. Rather, in a conditional order, Judge Stern granted Petitioners a grace period in which to comply with the discovery request lest

---

* The Associated Trustee's discovery was directed only to Self Retention and also included a Request for Production of Documents pursuant to Rule 34. The Associated Trustee's discovery requests were adopted by State Mutual which demanded that Self Retention's responses thereto also be served upon counsel for State Mutual.

sanctions be imposed. Petitioners failed to comply with the District Court's order and made no response to the outstanding discovery demand.*

While the Rule 37 motions were pending, the Associated Trustee served a second notice of deposition on March 1, 1979, seeking to examine McRell individually and in his capacity as president of Self Retention. Despite actual knowledge of the pendency of the deposition, McRell (and through McRell, Self Retention) failed to appear. Although Petitioners press their claim on the basis of Fifth Amendment privileges, *no assertion of any constitutional privilege was made* with respect to the noticed deposition. Petitioners' silence bespeaks only a wilful and calculated decision to avoid discovery.

After McRell had been indicted in Massachusetts and Petitioners had commenced their campaign to avoid discovery, the Petitioners stepped from behind their Fifth Amendment shield and began wielding the sword of their own discovery requests to various respondents. Starting with the representative of a bankrupt, Petitioners served interrogatories upon the Associated Trustee.** Thereafter, Petitioners propounded Rule 34 document requests to the Associated Trustee, State Mutual, Lloyds, Lowndes (USA) and Lowndes England. The Associated Trustee

---

* Apparently, by letter dated April 11, 1979 (one day before the grace period was to expire), McRell communicated with the District Court *ex parte* and reasserted his blanket refusal to respond to discovery. This letter was not served upon counsel for respondents and was written in total disregard of the District Court's two prior orders.

** These interrogatories were served prematurely by Petitioners and rejected as a nullity by counsel for the Associated Trustee They were never re-served in accordance with the Federal Rules.

duly served responses and objections to Petitioners' Rule 34 request yet Petitioners continued to press their own discovery by responding to the Associated Trustee's objections with a motion for sanctions and attorney's fees. (This motion was marked off the calendar *sua sponte* for the failure of Petitioners' counsel to comply with local court rules.)

Counsel for Petitioners appeared at the hearing on the Rule 37 motions on March 27, 1979 for the purpose of making application to withdraw as counsel. Such application was granted by the District Court by order executed March 29, 1979. Prior to that date, all requested discovery, including depositions, had been served and scheduled, and the blanket refusals had been asserted. By the time Petitioners' first counsel withdrew, all actions leading to the imposition of sanctions had occurred.

Because of Petitioners' repeated failure to participate in discovery, State Mutual, IAF, Associated and Dipple were forced to move in April and May, 1979, for a second round of motions for sanctions. Significantly, Petitioners once again defaulted, filed no opposing papers and failed to appear on the return date of the motions. Faced with a second default and a further violation of its prior orders, the District Court granted the requested sanctions which included granting judgment against Petitioners and dismissing their fourth party claims.

It is difficult to conceive of a more graphic "shield and sword" scenario than that scripted by Petitioners in this case. While attempting to frustrate the respondents' discovery at every turn, Petitioners pressed their own, and actively litigated their affirmative claims for relief. Their tactics thrust the respondents between Scylla and Charybdis, leaving them no option but to pursue sanctions. In the circumstances, the District Court, after giving Peti-

tioners several chances to correct their defaults over a long period, properly exercised its discretion in dismissing Petitioners' affirmative claims and granting judgment against Self Retention and McRell.

ARGUMENT

POINT I

Judgment granted against McRell and Self Retention based upon their wilful disregard of court orders and procedural requirements was an appropriate exercise of the trial court's discretion and raises no significant question to be reviewed in this Court.

Petitioners attempt to raise the hobgoblin of constitutional deprivation in order to gloss over their pattern of wilful defaults, both in discovery and in motion practice, and their calculated disregard of two orders of the District Court. Had Petitioners bothered to assert claimed Fifth Amendment privileges in such a manner as to permit the District Court to adjudicate their proper entitlement thereto, or had they not defaulted in response to at least six motions pursuant to Rule 37, they might have been able to raise a Fifth Amendment issue on which an Appellate Court could pass. But they simply, and inexcusably, refused discovery. In choosing to default and not asserting a Fifth Amendment privilege, they never reached the threshold of a Fifth Amendment claim. The issue here is therefore not constitutional—it concerns the question of how far recalcitrant litigants may proceed in abuse of the judicial process before being called to task for their conduct.

The facts of Petitioners' behavior are not in dispute. Petitioners asserted a blanket claim of Fifth Amendment

privilege with respect to responses to Interrogatories, made no response to request for production of documents, and failed to appear at a scheduled deposition. While represented and advised by counsel, they engaged in this calculated course of conduct notwithstanding Judge Stern's order of January 2, 1979, denying their motion for stay and finding their blanket refusal to respond to all discovery impermissible.

Petitioners thereafter continued to abuse and frustrate the judicial process by defaulting on the first round of motions to compel discovery and for sanctions, and then violating the District Court's April 3, 1979 order compelling discovery and conditionally granting the motion of IAF and the Associated Trustee for sanctions. At no time did Robert McRell or Self Retention request additional time for compliance with the Court's discovery orders. Rather, they actively pursued discovery from the other parties.

Petitioners have not asserted, and cannot assert, any law to support their blanket claim of Fifth Amendment privilege and total failure to respond to requests for discovery. The law is well settled that Fifth Amendment rights may not be asserted in a blanket fashion in advance of questions actually propounded. *United States* v. *Harmon,* 339 F.2d 354, 359 (6th Cir. 1964), *cert. denied,* 380 U.S. 944 (1965). "A 'blanket' refusal to answer all questions is unacceptable." *United States* v. *Malnik,* 489 F.2d 682, 685 (5th Cir.), *cert. denied,* 419 U.S. 826 (1974). *See also, United States* v. *Pierce,* 561 F.2d 735, 741 (9th Cir. 1977), *cert. denied,* 435 U.S. 923 (1978); *United States* v. *Carroll,* 567 F.2d 955, 957 (10th Cir. 1977).

The Third Circuit found a defendant obligated to assert his Fifth Amendment privilege in response to specific discovery requests in *United States* v. *American Ra-*

diator & Standard San. Corp., 388 F.2d 201 (3d Cir. 1967), *cert. denied*, 390 U.S. 931 (1968). *American Radiator* involved simultaneously pending criminal and civil antitrust actions. After approving the district court's denial of the stay of the civil action, the Court emphasized that this did not preclude defendants' right to make specific objections. The Court said:

> "We emphasize that the district court before which the civil antitrust suits are pending has not closed the door to any objections the criminal defendants may make to the answering of particular interrogatories or the production of particular documents. If they can show that a response to a particular demand in the civil suit is likely to injure them unfairly in the criminal actions, they are free to do so. The trial court has done no more than to reject blanket claims that procedurally the civil suits should remain at standstill and that no discovery whatever should be permitted until the criminal actions shall terminate." *Id.* at 205.

The Third Circuit restated the requirement that the privilege be asserted in response to specific questions in *DeVita* v. *Sills*, 422 F.2d 1172, 1178 (3d Cir. 1970), *followed, Golden Quality Ice Cream Co., Inc.* v. *Deerfield Specialty*, 87 F.R.D. 53 (E.D. Pa. 1980). In *DeVita*, the defendant in a civil proceeding sought to halt the action pending conclusion of criminal proceedings, claiming that compulsion to testify in the civil proceeding violated his privilege against self-incrimination in violation of the Fifth Amendment. *Id.* at 1177. The plaintiff claimed that, by being compelled to testify, he would be "put to a difficult choice" if forced to assert his Fifth Amendment privilege. *Id.* at 1178. In decisively rejecting this argument, the Circuit Court noted:

> "No authority has come to our attention for so broad a reading of the Fifth Amendment, and the countervailing possibilities of prejudice to civil litigants militates against any such extension of constitutional doctrine." *Id.* at 1178.

The court further noted that:

> "Plaintiff can, of course, object to depositions or interrogatories directed against him in a civil action where the answers might incriminate him in a pending criminal case. [citations omitted]. But the contention that an actual or potential defendant in a criminal case should not even be put to the difficult choice of having to assert the privilege in a related civil case was rejected in *United States* v. *Kordel,* 397 U.S. 1, 90 S.Ct. 763, 25 L.Ed.2d 1 decided on February 24, 1970." *Id.*

Similarly, the court in *In re Penn Central Securities Litigation, Robinson* v. *Penn Central Co.,* 347 F. Supp. 1347, 1348 (E.D. Pa. 1972) refused to stay deposition of a defendant in a pending criminal proceeding. The court cited Wigmore with approval and further stated that:

> "The privilege against self-incrimination in itself does not compel a court to order a stay of the deposition of a defendant in a pending criminal action."

Accord, Driver v. *Helms,* 402 F.Supp. 683 (D.R.I. 1975).

The Fifth Circuit outlined the same requirement in *United States* v. *Malnik, supra,* a case involving the service of a subpoena on the defendant by the Internal Revenue Service:

> "Malnik's Fifth Amendment objection to comply with the subpoena is presented to us in the absence of specific questions that may or may not tend to incriminate. To sustain his objection this court, as well as Malnik, would have to completely and accurately anticipate every question. * * * [W]e think such an objection constitutes a blanket refusal to comply with the subpoena and therefore is unacceptable." 489 F.2d at 685.

Manifestly, no party to this action could have been barred from its right of discovery under the Federal Rules by an assertion of a claimed Fifth Amendment privilege *in vacuo*. *Accord, e.g., Brewer* v. *Hill,* 453 F.Supp. 67 (D.C. Tex. 1978).

The rationale for the rule requiring assertion of specific objections to enunciated questions is that the protection accorded a criminal defendant of whom discovery is sought in a related civil case arises from his right to assert his Fifth Amendment privilege in response to enquiries, the answers to which may tend to incriminate him. In the District Court, Petitioners sought to avoid even *asserting* their claim of privilege, a tactic which was specifically rejected in *DeVita. Accord Clark* v. *Lutcher,* 77 F.R.D. 415, 417 (M.D. Pa. 1977), wherein the court followed *DeVita* and refused to order a blanket stay of a deposition pending disposition of a criminal proceeding. As stated in 8 Wigmore, *Evidence* §2268 at 402 (McNaughton rev. 1961):

> "The privilege . . . is merely an option of refusal, not a prohibition of inquiry."

Clearly, in the instant case, Petitioners, under pain of sanctions, were required either to answer or at least spe-

cifically to assert their claimed Fifth Amendment privilege in response to particular questions. Only by this method could the claim of privilege be tested with respect to the subject matter of each enquiry. The issues respecting scope and any waiver of the asserted privilege could not be raised intelligently by the parties or reviewed by a court were Petitioners permitted simply to refuse to participate in any discovery under a blanket claim of privilege. By doing this, Petitioners prevented the parties and the Court from any meaningful review of the situation.

The cases cited by Petitioners in support of their claim of error in the judgment against them because of their blanket refusal to respond to discovery are inapposite. In *Paul Harrigan & Sons* v. *Enterprise Animal Oil Co.*, 14 F.R.D. 333 (E.D. Pa. 1953), a protective order was issued to stay further discovery following receipt of defendants' responses to interrogatories. Some defendants had answered substantially all interrogatories; others had objected to some or all. The defendants seeking protection had made an ample showing as to how the information sought would constitute part of the proof in the criminal case. *Id.* at 334. They filed the proper motions under Rule 30(b). *Id.* The defendants made specific objections to Interrogatory questions. *Id.* at 335. The defendants were only in the posture of defendants; they were not third or fourth party plaintiffs.

The points of distinction from the instant case are clear. Unlike the *Harrigan* defendants, these Petitioners simply asserted the blanket privilege or defaulted in discovery. Petitioners here refused to specify the allegedly incriminating inquiries, describe the pending prosecution, file any appropriate motion, obey court orders, appear at significant proceedings or cooperate with the

court. These Petitioners, tried to use the Fifth Amendment shield but refused to permit the court to test the validity of their privilege claims. They, unlike the *Harrigan* defendants, were therefore properly subject to sanctions.

Petitioners also can not support their effort to avoid imposition of sanctions under the rule of *Mahne* v. *Mahne*, 66 N.J. 53 (1974). In that case, a husband sued his wife and co-respondent in divorce, and sought, through discovery, to have the two defendants admit to adultery and fornication, which were at that time misdemeanors in New Jersey. Though the defendant spouse refused to answer Interrogatory questions bearing on the alleged adultery under a claim of privilege, the court refused to uphold the sanction of striking defendants' pleadings based on facts inapplicable here.

The court noted that the plaintiff carried the burden of establishing his charge, and that there was

> "*No suggestion* by him that he [would] be unable to proceed expeditiously with his case without the aid of the pretrial testimony from the defendants." *Id.* at 62 (emphasis added).

Furthermore, there was evidence of a good faith effort to exercise the Fifth Amendment privilege. The defendant's Counterclaim was unrelated to the plaintiff's allegation of adultery, and the defendant only refused to respond to discovery concerning the alleged criminal conduct, providing responses with respect to her Counterclaim. *Id.* at 62. There was also no evidence that the defendant was attempting to secure discovery from the plaintiff concerning the issue about which defendant was refusing to provide information.

This is a different matter from the instant case. The respondents here made a vigorous and sufficient showing that, because of the complex nature of the alleged fraud and because its details were unobtainable except from Petitioners themselves, they could not properly prepare their claims or defenses without discovery. The affirmative claims of these Petitioners were inextricably bound up with the very information they had refused to disclose, and proper defense could not be conducted without the information sought. These Petitioners made no good faith efforts to respond to discovery. Furthermore, it would be disingenious to regard Petitioners as passive parties in light of their aggressive fourth party claims and discovery efforts. The holding in *Mahne,* therefore, merely affirms the appropriateness of the sanctions imposed against these Petitioners.

There is, in fact, substantial authority for the specific sanctions imposed by the Court on Petitioners in their posture as defendants. There is no doubt that sanctions imposed are at the discretion of the trial court, which "is not limited in any case of disregard of the discovery rules or court orders under them to a stereotyped response." Wright & Miller, Federal Practice and Procedure: Civil §2284 (1970). The entry of a default, though a drastic remedy, is appropriate when defendants exhibit "wilfulness, bad faith, or any fault of the parties. . . ." *Id.* See, *e.g., Danning* v. *LaVine,* 572 F.2d 1386 (9th Cir. 1978); *Affanato* v. *Merrill Bros.,* 547 F.2d 138 (1st Cir. 1977); *Kozlowski* v. *Sears, Roebuck & Co.,* 73 F.R.D. 73 (D.C. Mass. 1976); *Metropolitan Greetings, Inc.* v. *Michael McDonough, Inc.,* 60 F.R.D. 58 (E.D. Pa. 1973); *R. DeBouard & CIE* v. *S.S. Ionic Coast,* 46 F.R.D. 1 (S.D. Tex. 1969).

Following *Mahne,* the New Jersey Courts have even specifically approved the imposition of sanctions of entering a default judgment against a corporate defendant which, like these petitioners, conspired to secure payment for products never delivered, even where a Fifth Amendment privilege is properly invoked. *Whippany Paper Board Co., Inc.* v. *Alfano,* 176 N.J. Super. 363 (App. Div. 1980).

There can be no question in the instant case that Petitioners' abuse of the judicial process and improper assertion of Fifth Amendment privileges had thoroughly and conclusively frustrated the goals of justice. After giving Petitioners countless opportunities to cure their defaults and assert their claimed privileges in a proper manner to permit the court to rule upon them, the District Court was compelled by Petitioners' intransigence to impose the sanctions from which appeal was taken.

The court's reasonable use of its discretion should not be disturbed. It is submitted that Petitioners, as the Court of Appeals recognized, should not be rewarded for their abuses by reversal of the District Court.

POINT II

Alleged prejudice due to Pro Se representation is not an issue.

Petitioners request for relief based on alleged Pro Se status, raised for the first time in their Petition for Certiorari and contrary to the facts in this case, provides no grounds for vacating the judgment secured.

Where an issue has never been raised in proceedings prior to filing a Petition for Certiorari, it is not properly

before the Court and is not entitled to any consideration. *Brown* v. *United States,* 411 U.S. 223, 230 n.4 (1973); *Lawn* v. *United States,* 355 U.S. 339, 362-3 n.16 (1958); *California* v. *Taylor,* 353 U.S. 553, 557 n.2 (1957).

Not only is this issue not properly before the Court because not raised below, but, in addition, this claim has no foundation. The Petitioners were in fact represented by counsel through the bulk of the litigation below and were represented by counsel throughout *all* of the disputed discovery proceedings. Their counsel was not granted leave to withdraw from the case until March 29, 1979, a date subsequent to *all* of the relevant pleadings and discovery events.

The Petitioners had responded, counterclaimed, moved for stays, propounded interrogatories, refused to provide discovery, and precipitated Rule 37 motions, *all* while represented by counsel. The only significant proceedings following the convenient withdrawal of their counsel were respondents' motions for sanctions and the court's granting of the motions.

Moreover, Petitioners' counsel took an active part in the intransigent behavior which brought on sanctions. It was counsel who moved for a stay of all proceedings. It was counsel who remarked that the Associated Trustee's discovery request was "overburdensome."

It is significant to note that Petitioners were able to secure counsel for a prompt appeal to the Third Circuit, and for the instant Petition for review in this Court. They have not even provided any evidence to support their alleged financial inability to retain counsel during a brief period in 1979.

A related claim, also not raised below and without foundation, is the assertion that somehow discovery in a

Middlesex County Chancery matter indicates good faith on the part of Petitioners in their willingness to respond to discovery. As with the claim of prejudice due to Pro Se representation, Petitioners at no time during the district court proceedings suggested that discovery in that matter could satisfy demands proffered in this case. Nor could they. The parties and contentions at issue in that matter were sufficiently different to preclude the substitution of discovery taken therein for all discovery requested in this case. This claim is but another attempt by Petitioners to paint a picture of themselves and respondents as David and Goliath in an effort to invoke the sympathy of the Court. There are no legitimate grounds for such sympathy in this case. In truth, raising the Pro Se claims and suggestion that discovery was satisfied by the Middlesex County action for the first time in this Petition for Certiorari merely underlines the contemptuous attitude of Petitioners toward the judicial process thoughout this matter.

CONCLUSION

For all of the foregoing reasons, the Petition for Certiorari should be denied, and the Third Circuit's affirmance of the District Court's judgment should be allowed to stand in all respects.

Respectfully submitted,

WILENTZ, GOLDMAN & SPITZER,
900 Route 9, P.O. Box 10
Woodbridge, New Jersey 07095
(201) 636-8000
Attorneys for Respondents Underwriters at Lloyd's London, Lowndes Lambert Ltd. of London, England and Lowndes Lambert (U.S.A.), Inc.
ALAN M. DARNELL, for the Firm

Of Counsel:

ALAN M. DARNELL

ANDERSON RUSSELL KILL & OLICK, P.C.
666 Third Avenue
New York, New York 10117
(212) 850-0700
Attorneys for Respondent Thomas J. Cahill, as Trustee in Bankruptcy of Assciated Transport, Inc.

Of Counsel:
ANDREW P. BROZMAN

McCARTER & ENGLISH
550 Broad Street
Newark, New Jersey 07102
(201) 622-4444
Attorneys for Respondent State Mutual Life Assurance Company of America

Of Counsel:
ROSLYN S. HARRISON

PITNEY, HARDIN, KIPP & SZUCH
163 Madison Avenue
Morristown, New Jersey 07960
(201) 267-3333
Attorneys for Respondent International Accident Facilities, Inc.

Of Counsel:
DENNIS R. LAFIURA

GREENBERG, DAUBER & EPSTEIN, P.C.
Suite 815, Gateway I
Newark, New Jersey 07102
(201) 643-3700
Attorneys for Respondent Edward A. Dipple

Of Counsel:

EDWARD J. DAUBER

LEON C. MARCUS
475 Park Avenue South
New York, New York 10016
(212) 532-3535
Attorneys for Respondent Sidney B. Gluck, as Trustee in Bankruptcy of Eastern Freight Ways, Inc.

Of Counsel:

PETER D. WOLFSON